IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

BANK OF AMERICA, et al., No. C-99-4817-VRW

Plaintiffs, **ORDER**.

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.
_____/

Plaintiffs Bank of America, Wells Fargo, and California Bankers Association filed this action on November 3, 1999, seeking to enjoin the enactment of two municipal ordinances restricting ATM fees. This court issued a preliminary injunction on November 15, 1999. The court's injunction was summarily affirmed by the court of appeals on March 31, 2000. On January 20, 2000, the court granted California Federal Bank's ("Cal Fed") motion to intervene as a plaintiff in this action. Now before the court are amicus curiae Office of the Comptroller of the Currency's unopposed motion for leave to lodge its Ninth Circuit brief and the Office of the Thrift Supervision's

unopposed motion for leave to appear as amicus curiae. The motions of the Office of Thrift Supervision and the Comptroller of the Currency are GRANTED. Also before the court are the parties' cross-motions for summary judgment. For the following reasons, the court GRANTS plaintiffs' motions and DENIES defendants' motions.

I

On October 12, 1999, the city council in Santa Monica adopted section 4.32.040 to its municipal code, forbidding ATMs operated by financial institutions from charging fees for non-accountholders use of the machines. On November 2, 1999, the voters in the City and County of San Francisco passed a nearly identical initiative, Proposition F, requiring the adoption of the same law into San Francisco's Municipal Code as Section 648.1. These laws were enacted with the stated goals of protecting consumers against excessive fees and of ensuring competition amongst smaller banks and credit unions.

On November 3, 1999, the banks commenced this action against the cities and various city officials, alleging that the ordinances as applied to nationally-chartered banks are preempted by federal law. The Office of the Comptroller of Currency ("OCC") was permitted to appear as amicus curiae. On January 20, 2000, Cal Fed intervened alleging that the ordinances as applied to federal savings banks are preempted by federal law.

The challenged ordinances prohibit the charging of fees for ATM services by "financial institutions." Other

institutions are not regulated by these ordinances and, presumably, can continue to charge fees to their users. The ordinances prohibit only one class of ATM charges - surcharges levied against non-accountholder users of the machines by the financial institution which operates the machine. "Foreign fees" - charges levied by an ATM user's *own* bank for using another bank's ATM - remain lawful under the ordinances. Furthermore, bank ATM operators are still permitted to charge the non-accountholder's bank an "interchange fee" for processing the transaction. The challenged laws are enforceable by private rights of action against the banks; any individual who is charged a fee in violation of the ordinances may bring an action. Santa Monica's law became effective on November 11, 1999. Due to plaintiffs' concerns regarding the enforceability of the Santa Monica ordinance despite this court's order, plaintiffs have complied with the Santa Monica ordinance by cutting off access to all non-accountholders.

II

Nationally-chartered banks, such as plaintiffs Bank of America and Wells Fargo, are heavily regulated by the National Bank Act, 12 USC § 21 et seq ("NBA"). This act authorizes nationally chartered banks to "exercise * * * all such incidental powers as necessary to carry on the business of banking." 12 USC § 24(Seventh). The primary regulator of banks chartered under the Act is the OCC. The OCC has the "discretion to authorize activities beyond those specifically enumerated" in the Act. NationsBank of North Carolina v Variable Annuity Life

Insurance Corp, 513 US 251, 258, n 2 (1995). The ordinances implicate an "incidental power" essential to the "business of banking." An OCC regulation expressly permits any national bank to "charge its customers non-interest charges and fees." 12 CFR § 7.4002(a). The OCC has issued opinion letters and filed briefs in this action, asserting its position that the ordinances are preempted by the NBA.

Similarly, federal savings banks, such as plaintiff-intervenor California Federal, are governed by the Home Owners Loan Act, 12 USC § 1461 et seq ("HOLA"). The Office of Thrift Supervision ("OTS") has the authority to implement HOLA. Cal Fed and the OTS contend that HOLA completely preempts state laws which purport to regulate savings banks.

The cities contend the Electronic Funds Transfer Act, 15 USC § 1693 et seq ("EFTA"), specifically enables local governments to enact consumer protection laws regarding ATMs. The EFTA establishes regulations for electronic transfers, including ATM transactions. The EFTA states that it does not preempt state regulations over electronic transfers as long at the states' laws are not inconsistent with the EFTA. States are specifically granted the right to enact legislation which provides greater consumer protection. See 15 USC § 1693q. The cities argue that the disputed ordinances fall within this provision and are thus explicitly permitted.

A recent 8th Circuit case has addressed this very question. In Bank One, the court enjoined an Iowa statute that prohibited banks without branches in the state from operating an

ATM in the state and placed limits on advertising on the machines. See Bank One v Guttau, 190 F3d 844 (8th Cir 1999). The court found that the statute violated the National Bank Act and held that the EFTA cannot "save" a statute which interferes with a national bank's exercise of its banking powers. See id at 850.

The banks argue that the so-called "savings" provision of the EFTA does not grant states or cities the right to interfere with fees charged by banks. Rather, the banks argue, the type of laws envisioned by the EFTA would be consumer protection laws, such as regulations regarding lighting, hours of operations, locations, foreign-language capabilities or advertisements. According to the banks, the ordinances ban conduct which falls squarely within the banks' core functions and squarely outside the realm of consumer protection. The banks argue that the EFTA "savings" provision only applies to the EFTA itself; there is no indication that it addresses the preemptive effect of the NBA or HOLA.

The banks also argue that the cities' reliance on the EFTA is undermined by recent amendments to the act that require ATM operators to give notice of access fees to non-accountholder users. 15 USC § 1693b(d)(3). Implicit in Congress' decision to regulate notice of fees is the understanding that institutions may charge these fees. Congress, undoubtedly aware of local government efforts to ban fees, had an opportunity in enacting this amendment to state explicitly whether limits on fees are permitted. Congress failed to do so.

III

Both the banks and Cal Fed argue that the ordinances are preempted by governing federal law and not the EFTA. Federal law will preempt state law when: (1) federal law expressly preempts state law; (2) federal law occupies the field of regulation; or (3) federal law conflicts with state law. See Fidelity Fed. Sav. & Loan Ass'n v de la Cuesta, 458 US 141, 152-53 (1982).

A

Cal Fed claims two grounds for preemption of the ordinances, field occupation and conflict with federal law. ATM fees are argued to be controlled by HOLA and OTS regulations. The cities contend that the regulations cited by Cal Fed (12 CFR §§ 545, 557, 560) pertain in no way to the ATM surcharge on non-accountholders.

Congress granted OTS plenary and exclusive authority to regulate all aspects of the operations of federal savings associations. See 12 USC § 1463(a) and § 1464(a). Section 1464(b)(1)(F) authorizes Cal Fed to establish remote service units (such as ATMs) for the purpose of crediting or debiting accounts, crediting loan payments, and the disposition of related financial transactions "as provided in regulations prescribed by the [OTS] Director." 12 USC § 1464(b)(1)(F). OTS implemented this statutory provision by issuing the Electronic Operations Rules, 12 CFR pt. § 555. These rules provide that a

"Federal savings association * * * may use, or participate with others to use, electronic means of facilities to perform any function, or provide any product or service, as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines. " 12 CFR § 555.200(a). Authorized activities of federal savings banks include the right to collect fees for services, see 12 CFR § 557.12, and "to transfer, with or without fee, its customers' funds from any account (including a line of credit) of the customer at the [f]ederal savings bank or at another financial intermediary to third parties or other accounts of the customer on the customer's order or authorization by any mechanism or device." 12 CFR § 545.17. Further, the OTS has interpreted these regulations to apply to ATM operations. HOLA and OTS occupy the field of ATM fee regulation.

The cities also claim that their ordinances do not conflict with HOLA and OTS regulations. Federal savings banks have authority to collect fees associated with ATMs, as described earlier. This authority conflicts directly with the municipal ordinances that compel Cal Fed to provide these services for free. Therefore, both grounds for preemption are met. HOLA and OTS regulations preempt the cities' ordinances as applied to federal savings banks.

B

The banks contend the NBA preempts the ordinances as applied to nationally chartered banks. The cities claim that the ordinances do not infringe upon any express or incidental

NBA powers and are, therefore, not preempted. In fact, the ordinances directly prevent national banks from exercising a power that is authorized by the NBA as "incidental to" the business of banking.

The NBA sets forth the framework for the creation, regulation, and operation of national banks, including the scope of banking powers. These powers are enumerated and comprise functions such as lending money and taking deposits, but also include "all such incidental powers as shall be necessary to carry on the business of banking." 12 USC § 24(Seventh). The cities claim that there are no provisions in the NBA that pertain to ATMs. The NBA authorizes national banks to provide services through ATMs. "A national bank may establish and operate an [ATM] pursuant to 12 USC § 24 (Seventh)." 12 CFR § 7.4003. These services are part of the business of banking. See First Union National Bank v Burke, 48 FSupp 2d 132, 148 (D Conn 1999). Further, the banks are authorized to collect fees for the use of their ATMs under 12 CFR 7.4002 (a) & (b), as interpreted by the OCC. The NBA authorizes national banks to operate ATMs and charge a fee for their use. The cities' prohibition of these fees conflicts with the authority of the NBA. The cities' ordinances are therefore preempted.

C

Both the banks and Cal Fed disagree with the cities' claims that the NBA, HOLA, and OTS regulations do not preempt the ordinances. The cities claim that the EFTA enables local government to enact consumer protection laws regarding ATMs. As

shown above, the governing law for ATM fee regulations for nationally-chartered banks and federal savings banks is not the EFTA. The cities also claim that the "savings clause" of the EFTA constitutes federal anti-preemption legislation. See 15 USC § 1693q. Section 1693q provides:

> [t]his subchapter does not annul, alter or affect the law of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the [EFTA]. . . A state law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

"This anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks." Bank One v Guttau, 190 F3d at 850. Nothing in the EFTA supports an inference that "Congress intended to disrupt other federal laws including the National Banking Act by an implicit reservation of the power to administratively regulate banks to the states." First Union Nat'l Bank v Burke, 48 FSupp 2d at 147. This "savings clause" does not save the cities' ordinances from preemption by the NBA or the HOLA and OTS.

IV

In determining whether a preliminary injunction should be issued, the court must take into account either: (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and that balance of hardships tips sharply in its favor. See GoTo.com Inc v The Walt Disney Co, 202 F3d 1199, 1204 (9th Cir 2000). The standard for

granting a permanent injunction is essentially the same, except that to obtain a permanent injunction the movant must attain success on the merits. See Amoco Prod Co v Village of Gambell, Alaska, 480 US 531, 546 (1987).

This court finds that both the banks and Cal Fed have demonstrated success on the merits and will suffer irreparable injury if the cities are not enjoined from enforcing these ordinances. Through enforcement of the ordinances, plaintiffs will suffer irreparable economic loss.

Santa Monica reasserts its contention that the court cannot order the city to suspend the ordinance. This argument is meritless. The court possesses ample authority to prevent Santa Monica from purporting to deputize its citizens and others to conduct litigation to enforce an invalid enactment. Santa Monica's evidentiary objections are not well taken. The OCC October 25 and 27, 1999, letters speak for themselves (Undisputed Fact No. 14) and the identity of non-branch deployers of ATMs is beside the point (Undisputed fact Nos. 18, 19).

Accordingly, defendant City and County of San Francisco, California, as well as the other San Francisco defendants in this action, are hereby permanently ENJOINED from placing into effect, enforcing or taking any other action under the San Francisco Ordinance, or otherwise allowing the San Francisco Ordinance to become effective.

Defendant City of Santa Monica, California, as well as the other Santa Monica defendants are hereby permanently

ENJOINED from enforcing or taking any other action under the Santa Monica Ordinance relating to charges for the use of ATMs and directed to suspend the Santa Monica Ordinance.

Plaintiffs shall submit an appropriate form of judgment. The bond previously posted shall secure the injunction herein granted.

IT IS SO ORDERED.

VAUGHN R. WALKER
United States District Judge